Supreme Court, U.S.
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IN THE

Supreme Court of the United States

LOUIE A. FERRO, SR.,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

An expert selected by the United States examined Mr. Ferro, who is now 81 years of age, on an outpatient basis under 18 U.S.C. § 4241(b), and found him incapable to aid in his own defense due to permanent, untreatable brain damage caused by a stroke. Mr. Ferro respectfully submitted to the District Court that it would be unconstitutional to imprison for treatment a non-dangerous, untreatable person suffering from a mental illness or disorder. A subsequent order of the District Court of the United States for the Western District of Missouri directed the pretrial imprisonment of Mr. Ferro for up to four months for treatment under 18 U.S.C. § 4241(d)(1). The order of the lower court followed its determination that it had no authority to consider the permanent, untreatable nature of Mr. Ferro's condition. The Eighth Circuit Court of Appeals, on March 11, 2003, found that it had jurisdiction under the "collateral order doctrine" to consider the appeal, and affirmed the order of the lower court.

This Court's recent holdings in *Sell v. United States*, 539 U.S. __, 123 S. Ct. 2174, 2003 U.S. LEXIS 4594 (decided June 16, 2003), concerning this Court's jurisdiction under the "collateral order doctrine" and the requirement that lower courts consider if forced medication is substantially likely to render a defendant competent to stand trial are instructive on the questions in this case, but do not provide the precise answers needed to resolve the dispute involving Mr. Ferro.

The first question presented is whether this Court has jurisdiction under the "collateral order doctrine" to consider Mr. Ferro's Petition for a Writ of Certiorari.

The second question presented is whether it is constitutional to imprison for *treatment* a *non-dangerous, untreatable* person suffering from a mental illness or disorder.

The third question presented is whether 18 U.S.C. § 4241(d)(1) authorizes the imprisonment for *treatment* of an *untreatable* person incapable of assisting in his own defense due to a mental disease or defect.

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Petitioner respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The magistrate judge's report and recommendation (per Hays, M.J.) to imprison Mr. Ferro for treatment for up to four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed (Appendix ("Pet. App.") 14a-32a) is not otherwise published. The district court's opinion (per Wright, D.J.) adopting the magistrate judge's recommendation and ordering Mr. Ferro's commitment (Pet. App. 12a-13a) is not otherwise published. The court of appeals' opinion (per Webber, D.J., sitting by designation, joined by Loken[1] and Morris Sheppard Arnold, J.J.) affirming (Pet. App. 1a-11a) is published at 321 F.3d 756. The court of appeals' order denying rehearing by the panel (Pet. App. 33a) appears at 2003 U.S. App. LEXIS 7661.

STATEMENT OF JURISDICTION

The court of appeals entered its opinion and order on March 11, 2003, and denied rehearing by the panel on April 23, 2003. Petitioners invoke this Court's jurisdiction under the "collateral order doctrine" exception to the final judgment rule as is fully discussed below in the "Reasons for Granting the Writ" section.

STATUTORY PROVISIONS INVOLVED

The provisions of 18 U.S.C. §§ 4241, 4246 and 4247, relevant to this petition are reprinted in the Appendix at 34a-41a.

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1. Circuit Judge Loken became Chief Judge on April 1, 2003, subsequent to the opinion rendered in this case.

STATEMENT OF THE CASE

Relevant events concerning Mr. Ferro may be summarized as follows:

1. On July 14, 1999, Mr. Ferro, along with his son and two other persons, was charged in a fifteen-count Indictment with engaging in an alleged fraudulent scheme to resell without authority pharmaceuticals secured at a discount, in violation of 18 U.S.C. §§ 2, 371, 982, 1341, 1956(h) and 2314. Pet. App. 14a-15a.

2. On October 1, 1999, Mr. Ferro's counsel moved for an extension of time to file a motion to determine if Mr. Ferro's *physical* impairments due to a stroke he suffered in November 1998 rendered him unable to effectively participate in his defense. See Pet. App. 18a-19a.

3. On October 12, 1999, while an investigation of Mr. Ferro's physical impairments was underway by Mr. Ferro's counsel, the Government, pursuant to 18 U.S.C. §§ 4241(a) and (b), moved for a determination by the Court of Mr. Ferro's mental competency to stand trial. See Pet. App. 18a-19a.

4. On December 20, 1999, a Government-selected expert issued his report of his outpatient evaluation of Mr. Ferro, and concluded that Mr. Ferro was not competent to stand trial as he was incapable of assisting counsel in his defense. Pet. App. 19a-22a.

5. On August 30, 2001, the Eighth Circuit issued its Mandate of its opinion reversing and remanding the decision of the District Court granting the Defendants' Motion to Dismiss the Indictment for Failure to State an Offense, holding that the materiality of an alleged misrepresentation can no longer be decided pretrial as a matter of law by the District Court due to this Court's holding in *United States v. Gaudin*, 515 U.S. 506,

523 (1995), but instead must be presented to a jury as required under *Gaudin*. *United States v. Ferro, et al.*, 252 F.3d 964 (8th Cir. 2001), *cert. denied*, 534 U.S. 1083 (2002).

6. On February 11 and 26, 2002, the Government expert conducted, at the request of Mr. Ferro's counsel, additional evaluations of Mr. Ferro, including the ordering of a MRI of his head, and concluded that Mr. Ferro's mental status had deteriorated significantly since 1999, he had suffered severe brain damage, that his higher cognitive functions were gone and would not return, and that he was incapable of assisting counsel in his own defense. The Government's expert further concluded that imprisoning Mr. Ferro for several months to evaluate his competency to stand trial would be "redundant and unnecessary," and opined that depriving Mr. Ferro of his support system for such a period would "compromise his already present dementia and make matters worse for him." Pet. App. 22a-24a.

7. On May 21, 2002, the Magistrate Judge's Report and Recommendation was filed, wherein the Magistrate:

> RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order finding that Louie A. Ferro, Sr., is incompetent. It is further
>
> RECOMMENDED that the Court commit Louie A. Ferro, Sr., to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future defendant Ferro will attain the capacity to permit the trial to proceed.

In making the foregoing recommendation, the Magistrate noted that:

> Various courts have struggled with the issue of committing a defendant to the custody of the Attorney General for further ***testing*** when the defendant's condition is permanent, but the overwhelming consensus appears to be that the courts have no discretion and that they must comply with the procedures established by section 4241(d). (citations omitted) (emphasis added).

Pet. App. 27a, 31a-32a (emphasis added).

8. On June 21, 2002, the District Court by its Order adopted the Magistrate Judge's Report and Recommendation. Pet. App. 12a-13a.

9. On March 11, 2003, the Eighth Circuit held that it had jurisdiction to consider the appeal under the collateral order doctrine, and affirmed the District Court's Order of June 21, 2002. Pet. App. 1a-11a.

10. On April 23, 2003, the Eighth Circuit denied Mr. Ferro's petition for rehearing by the panel. Pet. App. 33a. Mr. Ferro then filed a motion for stay of mandate pending consideration by this Court of a petition for writ of certiorari that would be filed within the required ninety-day period. On May 8, 2003, the Eighth Circuit granted, in part, the requested stay by allowing Mr. Ferro an opportunity for thirty days to seek an additional stay from the Supreme Court. 2003 U.S. App. LEXIS 8693.

11. Mr. Ferro submitted an Application to Stay the Mandate within the period granted by the Eighth Circuit. On June 12, 2003, Justice Thomas denied the application.

12. This petition for a writ followed, along with a renewed Application to Stay the Mandate.[2]

REASONS FOR GRANTING THE PETITION

This case presents important, unresolved jurisdictional, constitutional and statutory issues.

I. This Case Presents An Important, Unresolved Jurisdictional Question.

Whether there is jurisdiction to consider an appeal of a pretrial order for involuntary incarceration under 18 U.S.C. § 4241(d)(1) of a person found under 18 U.S.C. § 4241(b) to be incompetent to aid in their defense has not been resolved by this Court.

The Eighth Circuit held that it had jurisdiction to consider Mr. Ferro's appeal of the District Court order at issue in this case even though the order was not a "final judgment." Pet. App. 7a. That holding was premised on the *Cohen* "collateral order doctrine," an exception to the final judgment rule when a lower court's order conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment. Pet. App. 5a-7a, citing *Flanagan v. United States*, 465 U.S. 259 (1984) and *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949).

Four other Circuits have held that the type of order at issue in this case satisfies the "collateral order doctrine." *United States v. Filippi*, 211 F.3d 649, 650-51 (1st Cir. 2000); *United States v.*

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2. Mr. Ferro's Pretrial Services Officer advised Mr. Ferro's counsel on July 16, 2003, that the Bureau of Prisons (BOP) had designated Mr. Ferro to self-surrender on August 25, 2003, at the BOP facility in Butner, North Carolina.

Gold, 790 F.2d 235, 238 (2d Cir. 1986); *United States v. Boigegrain*, 122 F.3d 1345, 1349 (10th Cir. 1997); *United States v. Donofrio*, 896 F.2d 1301, 1303 (11th Cir. 1990). An additional two Circuits have reviewed the merits of § 4241(d)(1) commitment orders without discussing jurisdiction. *United States v. White*, 887 F.2d 705 (6th Cir. 1989); *United States v. Sherman*, 912 F.2d 907 (7th Cir. 1990).

This Court recently held that there was jurisdiction to consider an appeal under the "collateral order doctrine" where a person already in custody under 18 U.S.C. § 4241(d)(1) faced involuntary medication in an effort to make the person competent to stand trial. *Sell*, 2003 U.S. LEXIS 4594 at 21-22.

Mr. Ferro's circumstances are analogous to those facing the defendant in *Sell*. Mr. Ferro is facing involuntary imprisonment for treatment when he has already been found by the Government-selected expert to have permanent, untreatable brain damage rendering him incompetent to aid in his own defense. Mr. Ferro's liberty interests are just as important as Mr. Sell's expectation of privacy and security interests. Just as in *Sell*, the decision concerning Mr. Ferro conclusively determined the disputed question, resolved an important issue completely separate from the merits of the action, and would be effectively unreviewable on appeal from a final judgment.

In addition, Mr. Ferro has a right *not to tried*, since he has been found by the Government-selected expert to have permanent, untreatable brain damage rendering him incompetent to aid in his own defense. This would seem to fit the characterization of a circumstance meriting jurisdiction by this Court as described in the dissenting opinion in *Sell*. 2003 U.S. LEXIS 4594 at 45 (Scalia, J., joined by O'Connor and Thomas, JJ.).

II. This Case Presents An Important, Unresolved Constitutional Question.

Whether the imprisonment of a *non-dangerous, untreatable* person suffering from a mental illness or disorder for *treatment* is permitted under the Constitution has not been resolved by this Court.

The commitment, even indefinitely, of *dangerous* persons suffering from mental illnesses has consistently been held by this Court to be within the bounds of due process mandated in the Constitution. *See, e.g.*, *Kansas v. Hendricks*, 521 U.S. 346, 378 (1997) ("This case does not require us to consider whether the Due Process Clause always requires treatment—whether, for example, it would forbid civil confinement of an untreatable mentally ill, dangerous person."); *Seling v. Young*, 531 U.S. 250, 262 (2001) ("For those individuals with untreatable conditions, however, we explained that there was no federal constitutional bar to their civil confinement, because the State had an interest in protecting the public from dangerous individuals with treatable as well as untreatable conditions. [Hendricks] at 366."); *Foucha v. Louisiana*, 504 U.S. 71 (1992); *Addington v. Texas*, 441 U.S. 418 (1979); *Humphrey v. Cady*, 405 U.S. 504 (1972); *Compagnie Francaise de Navigation a Vapeur v. Louisiana Bd. of Health*, 186 U.S. 380 (1902) (permitting involuntary quarantine of persons suffering from communicable diseases).

This Court appropriately has been cautious in permitting involuntary commitment of those suffering from mental infirmities. In particular, the Court has emphasized that a person who suffers from a mental disorder and who is committed solely on account of his incapacity to proceed to trial, may be deprived of liberty *for only*:

> the reasonable period of time necessary to determine whether there is a substantial probability that he will

> attain that capacity in the foreseeable future. If it is determined that this is not the case, *then the State must either institute the customary civil commitment proceeding that would be required to commit indefinitely any other citizen, or release the defendant*.

Jackson v. Indiana, 406 U.S. 715, 738 (1972) (emphasis added). In *Jackson*, which was decided by a unanimous vote of the seven participating Justices, the Court reasoned, in an opinion delivered by Blackmun, J., that "[a]t the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id. Jackson*, as explained in a concurring opinion in *Youngberg v. Romeo*, 457 U.S. 307 (1982), means that commitment without any "treatment" whatsoever would not bear a reasonable relation to the purposes of the person's confinement. *Id.* at 325-26 (Blackman, J., joined by Brennan, J., and O'Connor, J.).

The issue of whether "the provision of treatment, standing alone, can ever constitutionally justify involuntary confinement or, if it can, how much or what kind of treatment would suffice for that purpose" was acknowledged, but not decided in *O'Connor v. Donaldson*, 422 U.S. 563, 574 (1975). In *O'Connor*, the Court stated that "[w]here 'treatment' is the sole asserted ground for depriving a person of liberty, it is plainly unacceptable to suggest that the courts are powerless to determine whether the asserted ground is present." *Id.* at 574, citing *Jackson*, *supra*.

The *Jackson*-defined constitutionally permissible parameters for the commitment of a person solely on account of his incapacity to proceed to trial were codified, at least in part, in the Insanity Defense Reform Act of 1984 at 18 U.S.C. §§ 4241 and 4247. The sections of relevance to the issue here are those governing the "examination" of a person to determine if he has

the mental competence to understand the nature and consequence of the proceedings against him or to assist properly in his defense, §§ 4241(a) and (b) and 4247(b) and (c), and the "treatment" to restore his competence, § 4241(d). An "examination",[3] at the court's discretion, is performed on an outpatient and/or committed basis for no more than 30 days, subject to a possible 15-day extension. "Treatment" is on a committed basis only in the custody of the Attorney General for an initial period of no more than four months, subject to a additional reasonable period of time if the court finds that there is a substantial probability that the person will attain the capacity for the trial to proceed within the additional time period.

The "examination" process appears to be consistent with *Jackson* in that any commitment is for 30 days subject to a 15-day extension, and there is a reasonable relationship between the purpose of commitment and the nature of the commitment.

The "treatment" process also arguably appears to be consistent with the reasonable time period limitation in *Jackson*, though the reasonable relationship between the purpose of commitment – treatment – and the nature of the commitment does not exist if the person will not improve due to a permanent, irreversible condition.

Mr. Ferro thus submits that the District Court order directing his commitment for *treatment* when he is in fact *untreatable* is

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3. BOP examination protocol includes specifying the contents of an examination report to the court that must include: "[c]omment upon the presence or absence of brain damage, motor impairment, organic disorder, and other related physical disorders, and whether treatment could be beneficial or corrective." BOP Program Statement 5310.12, August 30, 1993, Chapter 9, Attachment A, Page 2. Pet. App. 44a. Thus, whether a person is *treatable* or *untreatable* should be known to the court prior to committing the person for *treatment* under 18 U.S.C. § 4241(d)(1) as the person's "prognosis" must be included in the report of the examination conducted by the psychiatrist or psychologist in the BOP or private sector. 18 U.S.C. §§ 4247(b) and (c).

defective as it does not afford him his due process protections under the Constitution. Such a commitment flies in the face of the standard in *Jackson* which requires a reasonable relationship between the nature and duration of a commitment and the purpose for which an individual is committed. *Jackson* at 738. Also, the concurring opinion in *Youngberg* brings the issue into clearer focus with the explanation that commitment without any treatment whatsoever would not bear a reasonable relationship to the purposes of the person's commitment. *Youngberg* at 325-26. In that concurring opinion in *Youngberg*, Justice Blackman explained the Court's holding in *Jackson* as follows:

> In *Jackson v. Indiana*, 406 U.S. 715 (1972), this Court, by a unanimous vote of all participating Justices, suggested a constitutional standard for evaluating the conditions of a civilly committed person's confinement: "At the least, due process requires that the nature and duration of commitment bear some reasonable relation to the purpose for which the individual is committed." *Id.*, at 738. Under this standard, a State could accept a person for "safekeeping," then constitutionally refuse to provide him treatment. In such a case, commitment without treatment would bear a reasonable relation to the goal for which the person was confined.
>
> If a state court orders a mentally retarded person committed for "care and treatment," however, I believe that due process might well bind the State to ensure that the conditions of his commitment bear some reasonable relation to each of those goals. In such a case, commitment without any "treatment" whatsoever would not bear a reasonable relation to the purposes of the person's confinement.

457 U.S. at 325-26 (Blackman, J., joined by Brennan, J., and O'Connor, J.).

Finally, each of the Circuits that have considered this issue erred when they concluded that they were powerless to consider the permanency or untreatable nature of a condition prior to committing a person for *treatment*. See *Ferro*, Pet. App. 8a-9a[4]; *See also United States v. Shawar*, 865 F.2d 856, 861 (7th Cir. 1989) (After the District Court had refused to order commitment due to the lack of "any credible evidence that I find believable that there is a likelihood that he will improve as a result of a commitment to a federal facility," the Circuit Court reversed saying the District Court should not have considered the likelihood of recovery.); *United States v. Donofrio*, 896 F.2d 1301, 1302-03 (11th Cir. 1990) (Evidence concerning the permanency of the defendant's condition was presented at his competency hearing, though the Circuit Court affirmed the District Court's commitment of the Defendant saying that "permanency" was not "before" the District Court prior to its order, but would be after the 120-day evaluation); *United States v. Filippi*, 211 F.3d 649, 651 (1st Cir. 2000).

Instead, as this Court *reasoned*, without deciding, in *O'Connor*, courts do have the power to determine if there is a sufficient basis for *treatment* where it is the sole asserted ground for depriving a person of liberty. *O'Connor* at 574, citing *Jackson, supra*.

Mr. Ferro consistently argued before the Eighth Circuit in his briefs and other pleadings, and at oral argument, that the

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4. The Eighth Circuit attempted to redefine the meaning of "treatment" as to encompass more than "improvement." Neither regulations of the BOP, see pages 20-21 below, nor recognized medical authority lend any support to such a redefinition. Three medical dictionaries - Dorland's Illustrated Medical Dictionary; Miller-Keane Encyclopedia & Dictionary of Medicine, Nursing & Allied Health; and Taber's Cyclopedic Medical Dictionary – define "active treatment" virtually in an identical manner: Dorland's: "that which is directed immediately to the cure of a disease or injury;" Miller-Keane: "treatment directed immediately to the cure of the disease or injury;" Taber's: "treatment directed specifically toward cure of a disease."

contested order violates his due process and equal protection rights under the United States Constitution in that he would be deprived of his liberty without due process of law, since there is no rational basis for the hospitalization for *treatment* of an *untreatable* person. In response, the Eighth Circuit stated that "treatment" encompasses more than "mere improvement" – it includes "diagnosis" and "determination" as defined by the *Filippi* and *Donofrio* Courts, and "[t]he limited time period of hospitalization minimizes potential harm to the defendant and comports with due process. [*Filippi*] at 652 (finding the statute constitutional because it is 'flexible and case oriented in determining the length of incarceration')." *Ferro*, Pet. App. 10a-11a. If "diagnosis" is the true purpose for commitment, then to be permissible under the Constitution the commitment should have been ordered under the "examination" statutes, 18 U.S.C. §§ 4241(a) and (b) and 4247(b) and (c), not the "treatment" statute, 18 U.S.C. § 4241(d).

This Court in *Sell* held, in order to meet Constitutional requirements, that lower courts must find, prior to involuntarily medicating a person in custody under 18 U.S.C. § 4241(d)(1), that such treatment "is substantially likely to render the defendant competent to stand trial." 2003 U.S. LEXIS 4594 at 27. Though this Court in *Sell* did not mention the *reasoning* in *O'Connor* that courts have the power to determine if there is a sufficient basis for *treatment* where it is the sole asserted ground for depriving a person of liberty, *O'Connor* at 574, citing *Jackson*, *supra*, the holdings in *Sell* seem to embody that reasoning. Surely, therefore, to be in accord with Constitutional requirements, and to be consistent with the *reasoning* in *O'Connor* and the holdings in *Sell*, lower courts can now be empowered to consider the permanent, *untreatable* nature of a defendant's condition prior to ordering the defendant imprisoned for *treatment*.

III. This Case Presents An Important, Unresolved Statutory Question.

Congress enacted the Insanity Defense Reform Act in 1984. The portions of that Act relevant to the issue in this case were codified at 18 U.S.C. §§ 4241, 4246 and 4247, and are reproduced in the appendix. Pet. App. at, respectively, 34a-35a, 36a-38a, 39a-41a.

A. The Statutory Scheme

The statutory scheme involves several steps. First, "if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable . . . to assist properly in his defense," the defendant or the Government can request a hearing to determine the defendant's mental competency, or in the absence of such a request, the Court on its own motion can set a hearing. 18 U.S.C. § 4241(a).

Second, prior to the hearing, the Court "*may* order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c)." 18 U.S.C. § 4241(b) (emphasis added). The relevant subsections of 4247 provide that any examination "*shall* be conducted by a licensed or certified psychiatrist or psychologist" and that the Court "*may* commit the person to be examined for a reasonable period, but not to exceed thirty days . . . to the custody of the Attorney General for placement in a suitable facility" (emphasis added). Further, the report of the examination "*shall*" include:

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, ***prognosis***, and –

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

* * *

(C) if the examination is ordered under section . . . 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another.

(emphasis added).

Third, if after the hearing the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court:

> ***shall commit*** the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant ***for treatment*** in a suitable facility –

(1) for such a reasonable period of time, not to exceed four months, ***as is necessary to determine*** whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until –

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law; whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

18 U.S.C. § 4241(d) (emphasis added).

Finally, the dangerousness determination procedure under 18 U.S.C. § 4246 is not automatic as the Eighth Circuit stated in *Ferro*, Pet. App. 8a, nor does 18 U.S.C. § 4241 and § 4246, "read together, entitle the government to a dangerousness hearing

before a defendant is released due to incompetency to stand trial," Pet. App. 11a, but instead is invoked only if:

> the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons . . . who has been committed to the custody of the Attorney General pursuant to section 4241(d) . . . is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available.

18 U.S.C. § 4246(a).

B. The Important, Unresolved Statutory Issue

The problem for Mr. Ferro, and others in his class of *untreatable* persons who are incompetent to assist in their defense, is that while 18 U.S.C. §§ 4247(b) and (c) require that medical professionals determine the prognosis for these persons and so advise a court, the courts then effectively ignore the prognosis if it defines a permanent and thus untreatable condition. Instead the courts focus solely on the "shall commit" language in 18 U.S.C. § 4241(d) without proper consideration of the words that follow – "treatment," "as is necessary," and "attain the capacity to permit the trial to proceed," and claim the courts are powerless to even consider that a person's condition is permanent and thus untreatable. *See Ferro*, Pet. App. 8a-9a; *See also United States v. Shawar*, 865 F.2d 856, 861 (7th Cir. 1989); *United States v. Donofrio*, 896 F.2d 1301, 1302-03 (11th Cir. 1990); *United States v. Filippi*, 211 F.3d 649, 651 (1st Cir. 2000).

But Mr. Ferro's factual circumstances are distinguishable because in this case the Government-selected expert concluded that Mr. Ferro suffers from untreatable severe brain damage, as corroborated by an unimpeachable MRI examination, that has caused cognitive impairments making it impossible for Mr. Ferro to adequately assist in his own defense. *See Ferro*, Pet. App. 11a (". . . the medical reports . . . showed by a preponderance of the evidence that the condition was permanent. . . .")

Mr. Ferro submits that the District Court order directing his commitment for *treatment* when he is in fact *untreatable* is defective in that the relevant statute does not authorize commitment for treatment of an untreatable person.

This Court, in *Robinson v. Shell Oil Company*, 519 U.S. 337, 340-41 (1997) (citations omitted), provided the instructions on interpreting a statute, as follows:

> Our first step in interpreting a statute is to determine whether the language at issue has a plain and unambiguous meaning with regard to the particular dispute in the case. Our inquiry must cease if the statutory language is unambiguous and 'the statutory scheme is coherent and consistent.'
>
> The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.

One of the relevant provisions here, 18 U.S.C. § 4241(d)(1), reads as follows:

> (d) Determination and disposition. – If, after the hearing, the court finds by a preponderance of the

> evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court ***shall commit*** the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant ***for treatment*** in a suitable facility –
>
> > (1) for such a reasonable period of time, not to exceed four months, **as is necessary to determine** whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed;

(emphasis added).

The context of this statute is clear. Treatment should be undertaken to restore a defendant's mental capacity so as to permit the trial to proceed. The intent of Congress in enacting this statute is thus clear from the statute. *See Robinson*, 519 U.S. at 340 ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole."); *also see Green v. Bock Laundry Machine Co.*, 490 U.S. 504, 528 (1989) (Scalia, J., concurring) ("The meaning of terms on the statute books ought to be determined, not on the basis of which meaning can be shown to have been understood by a larger handful of the Members of Congress; but rather on the basis of which meaning is (1) most in accord with context and ordinary usage, and thus most likely to have been understood by the whole Congress which voted on the words of the statute (not to mention the citizens subject to it), and (2) most compatible with the surrounding body of

law into which the provision must be integrated – a compatibility which, by a benign fiction, we assume Congress always has in mind.")

Even though the context is clear, the words utilized, and the organization of those words, create ambiguities. *See Robinson*, 519 U.S. at 340; *also see Green*, 490 U.S. at 528 (Scalia, J., concurring). Courts interpreting this statute, as discussed above at pages 11 and 16, generally have focused solely on the words "shall commit," without proper consideration of the words that follow – "treatment," "as is necessary" and "attain the capacity to permit the trial to proceed." Indeed some of those courts have redefined "treatment" to include "diagnosis" as that latter word is used in the examination sections of the statute, 18 U.S.C. §§ 4241(a) and (b) and 4247(b) and (c). *Ferro*, Pet. App. 10a-11a; *Filippi*. 211 F.3d at 651; *Donofrio*, 896 F.2d at 1303.[5]

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5. "Diagnosis" and "examination" mean the same thing. Taber's Cyclopedic Medical Dictionary defines "diagnosis" as

> [t]he use of scientific and skillful methods to establish the cause and nature of a sick person's disease. This is done by evaluating the history of the disease process; the signs and symptoms present; laboratory data; special tests such as x-ray pictures and electrocardiograms. The value of establishing a diagnosis is to provide a logical basis for treatment . . . .

Taber's defines "examination" as "[t]he act or process of examining the body to determine the presence or absence of disease." On the other hand, "treatment" has an entirely different meaning from "diagnosis" or "examination." *Taber's* defines "treatment" as "[a]ny specific procedure used for the cure or the amelioration of a disease or pathological condition."

Congress recognized these different meanings by, for example, using "examination" and "treatment" to convey different meanings. In 10 U.S.C. § 1077(a)(5) and (7), Congress defined the types of health

(Cont'd)

Respectfully, such reasoning produces an absurd and harmful result – the incarceration of Louie Ferro, Sr., whom the *Government's* psychiatrist has found to be *untreatable* due to organic brain damage, for *treatment* in a prison away from his family and support group. See *Green*, 490 U.S. at 528 (Scalia, J., concurring) ("We are confronted here with a statute which, if interpreted literally, produces an absurd, and perhaps unconstitutional, result.") There are two classes of persons found to be "presently suffering from a mental disease or defect rendering [them] mentally incompetent to the extent that [they are] unable to understand the nature and consequences of the proceedings against [them] or to assist properly in [their] defense." One class is comprised of persons with *treatable* conditions. The other class is comprised of persons, like Mr. Ferro, with conditions that are *untreatable*.

Regulations of the BOP also underscore the *treatment* purpose of such hospitalization. For example, BOP Program

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care that could be provided to include (5) ***[t]reatment*** of nervous, mental, and chronic conditions, and (7) [p]hysical ***examinations*** . . . ." (emphasis added). Also, in 42 U.S.C. § 1395dd which is entitled "Examination and treatment for emergency medical conditions and women in labor," Congress mandated a two-step process, beginning with an examination to determine if a certain medical condition existed, which was to be followed, under specific circumstances, with treatment if consented to by the patient.

18 U.S.C. § 4241 also provides for a two-step process for examination and treatment. The two-step process begins with an examination under § 4241(b) and treatment under § 4241(d). BOP regulations track this two-step process by (1) recognizing the ethical conflict in the same psychologist participating in the "examination" and "treatment," and (2) directing those roles be performed by different psychologists. Pet. App. 42a-43a.

Accordingly, reading "diagnosis" into the word "treatment" is unsupported when the *Robinson* Court's instructions concerning statutory analysis are applied.

Statement 6000.05, dated September 15, 1996, at Chapter IX, page 4, includes the requirement that "It is the clinical staff's obligation to attempt to restore this individual to competency to stand trial within the time frame allowed."[6] Pet. App. 46a.

Read sensibly, 18 U.S.C. § 4241(d) should only apply to the class of *treatable* persons whose conditions may in fact improve, but not to a class, including Mr. Ferro, of *untreatable* persons whose permanent, irreversible conditions cannot improve. The language "as is necessary" naturally leads to this conclusion. The statute plainly states that "[t]he Attorney General shall hospitalize the defendant for *treatment . . . as is necessary. . . .*" *Id.* (emphasis added). Thus any application of 18 U.S.C. § 4241(d) to the class, including Mr. Ferro, of *untreatable* persons whose permanent, irreversible conditions

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6. The BOP recognizes that, even where the person has been hospitalized under 18 U.S.C. § 4241(d), it cannot administer involuntary treatment, including medication, without "proper due process procedures." BOP Program Statement 6010.01, dated September 21, 1995, pp. 1, 3-6. Mr. Ferro, of course, is not competent to participate in the due process procedures outlined in BOP Program Statement 6010.01, just as he is not competent to assist in his own defense, which raises an interesting issue whether any treatment, including medication, administered by the BOP would violate Mr. Ferro's due process rights.

Since the issuance of this regulation in 1995, this Court decided in *Sell*, *supra*, that a person does indeed have due process rights that must be accommodated prior to the involuntary administration of medication, including a determination by a lower court that involuntary medication is substantially likely to render the defendant competent to stand trial and is medically appropriate. Moreover, this Court established in *Sell* a requirement that a lower court "must find that any alternative, less intrusive treatments [than involuntary medication] are unlikely to achieve substantially the same results." Mr. Ferro submits that implicit in that holding is that the person has been found to be treatable, though this Court in *Sell* did not specifically so hold, nor did this Court in *Sell* reach the broader question of whether any treatment first requires a finding by a lower court that the person is indeed treatable.

cannot improve would violate constitutional due process requirements, a result that can and should be avoided by appropriately construing the statute.

Mr. Ferro indisputably has severe, permanent, untreatable brain damage that is readily confirmed by medical tests. Mr. Ferro does not have a "mental illness" that is difficult to diagnose and which is prone to "faking" that could be discovered through the application of a 30-day period of "examination" under the watchful eye of experts in the BOP as authorized by 18 U.S.C. § 4241(b) and 18 U.S.C. § 4247(b). In this case, the Government did not seek an examination by the BOP under 18 U.S.C. § 4241(b) and 18 U.S.C. § 4247(b), nor did the Court deem such a commitment necessary, relying instead on an outpatient evaluation of Mr. Ferro as ordered by the Court in its discretion.

The only authority for the imprisonment of an untreatable person is where the person is also a danger to society, which not even the Government claims Mr. Ferro is. There simply is no reasonable relationship between confining Mr. Ferro for four months and any purported *treatment* because his condition is permanent and irreversible. The question whether this federal statute compels courts to order an unconstitutional involuntary commitment is an important issue that merits plenary review by this Court.

The evidence is clear that Mr. Ferro does indeed suffer from an *untreatable* condition that renders him incapable of assisting in his defense. Incarceration for *treatment* is a futile exercise that will take away from him the meager quality of life left for him. Mr. Ferro is an 81-year-old gentleman in the twilight of his life whose wife struggles daily to make the quality of his life as good as she can make it, given his deteriorating mental capacity. Should Mr. Ferro be required to be incarcerated for *treatment* in an effort to restore his competency, we will find

ourselves at the end of that exercise at the same point that we are today – Mr. Ferro has dead brain tissue – his cognitive reasoning is gone and will never return.

Mr. Ferro is not a danger to society. It is not necessary to place Mr. Ferro in an environment which carries the real risk of real harm to him by incarceration away from family and support groups that permits his tenuous line to reality to be maintained.

* * * *

Determining by way of *examinations* if a non-dangerous person like Mr. Ferro 1) suffers from a mental disease or defect that renders him incapable of assisting in his own defense; 2) is or is not dangerous to himself or others; and 3) has a *treatable* mental disease or defect, either on an outpatient basis and/or by commitment to the custody of the Attorney General for a limited period, appears to fall within the constitutional boundaries this Court has drawn. The statutory scheme as codified at 18 U.S.C. § 4241(b) and 18 U.S.C. § 4247(b) and (c), provides for all of that, though the wording could be improved to make the meaning of "prognosis" crystal clear that it includes the need to opine as to whether the mental disease or defect is treatable or untreatable, and whether the person is or is not a danger to himself or others.

Should such an *examination*, conducted on an *outpatient* basis by someone other than a BOP-associated expert, report that the person is *untreatable* then the lower court in its discretion could determine if an additional *examination* by a BOP-associated expert should be conducted either on an outpatient or committed basis, under 18 U.S.C. § 4241(b) and 18 U.S.C. § 4247(b).

Should such *examinations* report that the person is *treatable*, then the statutory scheme as codified at 18 U.S.C. § 4241(d) can be followed without going beyond constitutional boundaries.

But should such *examinations* report that the person is *untreatable*, then the statutory scheme lacks clear direction due to 18 U.S.C. § 4241(d) specifically requiring commitment *for treatment*. In that circumstance, the lower court could follow the *apparent* authority laid out by this Court in *O'Connor*, 422 U.S. at 574, and in *Sell*, *supra*, and exercise its power to find the person incompetent to assist in his own defense and non-dangerous. Also, the lower court could in that circumstance simply follow the Bail Reform Act and continue the existing bond. The United States then would have the option to voluntarily move to dismiss the indictment. If the United States did not do so, then the defendant could move for dismissal of the indictment.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DATED AND FILED MARCH 11, 2003

UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

No. 02-2805

UNITED STATES OF AMERICA,

Appellee,

v.

LOUIE A. FERRO, SR.,

Appellant.

January 16, 2003, Submitted
March 11, 2003, Filed

Before LOKEN and MORRIS SHEPPARD ARNOLD, Circuit Judges, and WEBBER,[1] District Judge.

WEBBER, District Judge.

Louie A. Ferro, Sr. was found incompetent to stand trial. Ferro appeals the district court's[2] order committing him to the

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1. The Honorable E. Richard Webber, United States District Judge for the Eastern District of Missouri, sitting by designation.

2. The Honorable Scott O. Wright, United States District Judge for the Western District of Missouri.

custody of the Attorney General for treatment, for a reasonable period of time not to exceed four months, to determine whether there was a substantial probability that in the foreseeable future, he would attain the capacity to stand trial. We affirm.

I.

On July 14, 1999, a grand jury returned an indictment alleging that Louie A. Ferro, Sr., Louie A. Ferro, Jr., Wilbur Swift, and Kevin D. Staley participated in an unlawful scheme to defraud pharmaceutical sellers. The indictment charged defendants with conspiracy to transport property obtained by fraud across state lines, conspiracy to commit money laundering, transportation of pharmaceutical goods by fraud, use of proceeds obtained by fraud, and mail fraud. Prior to return of the indictment, counsel for Defendant Louie A. Ferro, Sr. ("Ferro") notified the government that Ferro had suffered a stroke in November of 1998; however, at the arraignment on July 27, 1999, counsel indicated that Ferro would not raise the defense of incompetency to stand trial. Nonetheless, in September 1999, Ferro's counsel faxed a neurological report to the government which indicated that Ferro was unable to participate in his defense. On October 12, 1999, the government requested that the district court determine Ferro's mental competency to stand trial.[3]

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3. The government's request was made pursuant to 18 U.S.C. § 4241(a). The statute provides:

> (a) Motion to determine competency of defendant.—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file

(Cont'd)

Appendix A

The district court ordered a psychiatric or psychological examination to determine Ferro's competency to stand trial.[4] Stanton L. Rosenberg, M.D., retained by the government, conducted the examination in December 1999. The examination consisted of two one-hour interviews with Ferro. Dr. Rosenberg also held a one-hour meeting with Ferro's counsel and a one-hour and ten-minute interview with counsel for the government. In addition, Dr. Rosenberg reviewed hospital and out-patient treatment records relating to Ferro's 1998 stroke, a neuropsychological evaluation report from August 1999, and a speech language evaluation conducted in September 1999. In his report, dated December 20, 1999, Dr. Rosenberg opined that Ferro suffered from a moderate degree of dementia, secondary to his stroke. Dr. Rosenberg concluded that Ferro was not competent to stand trial and that "prognosis for further improvement is probably extremely poor."

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> a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.

18 U.S.C. § 4241(a).

4. A psychiatric or psychological examination may be ordered by the district court pursuant to 18 U.S.C. § 4241(b), which provides that "[p]rior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c)."

Dr. Rosenberg's report was submitted to the district court, and the government requested a hearing to determine competency under 18 U.S.C. § 4241(c). Prior to scheduling the hearing, however, the district court dismissed the indictment for failure to state an offense. On appeal by the government, the judgment of the district court dismissing the indictment was reversed, and the case was remanded for further proceedings. *See United States v. Ferro*, 252 F.3d 964 (8th Cir. 2001), *cert. denied*, 534 U.S. 1083, 151 L. Ed. 2d 700, 122 S. Ct. 817 (2002).

After remand, the district court held a status conference on January 25, 2002, during which counsel for Ferro represented that Ferro's condition had deteriorated since the 1999 examination. Dr. Rosenberg conducted a follow-up examination in February 2002 and concluded that Ferro's "mental status has deteriorated significantly." Dr. Rosenberg concluded that Ferro suffered from chronic cerebrovascular disease, that the disease was not curable, and that the dementia would be progressive. Again, Dr. Rosenberg concluded that Ferro was not competent to stand trial. Moreover, Ferro's treating physician, Roman Enriquez, M.D., reviewed an MRI, which, in his opinion, demonstrated extensive hemispheric white matter abnormalities and cerebellar infarcts. Dr. Enriquez diagnosed Ferro with vascular dementia, a progressive disease.

The district court concluded that Ferro was incompetent to stand trial. In accordance with the provisions of 18 U.S.C. § 4241(d), the district court issued an order on June 21, 2002, adopting a report and recommendation of the magistrate judge.[5] The district court committed Ferro to the custody of the Attorney

5. The Honorable Sarah W. Hays, United States Magistrate Judge for the Western District of Missouri.

General for a reasonable period of time, not to exceed four months, to determine whether there was a substantial probability that in the foreseeable future Ferro would attain the capacity to permit the trial to proceed. Ferro appeals the district court's order committing him to the custody of the Attorney General. Ferro argues that 18 U.S.C. § 4241(d) only provides for involuntary hospitalization if the defendant has a treatable condition. Therefore, Ferro asseverates that the district court erred in committing him to the custody of the Attorney General because the undisputed medical evidence indicated that his condition was chronic, progressive, and untreatable. While Ferro concedes that the district court's order committing him to the Attorney General's custody was not a final order, he asserts that jurisdiction to hear his appeal exists based upon the "collateral order doctrine." This Court granted Ferro's request for a stay of the district court order committing him to the custody of the Attorney General on July 12, 2002, to permit an appeal of the district court order.

II.

Ferro contends that the order of the district court committing him to the custody of the Attorney General is immediately appealable under the collateral order exception to the final judgment rule. The government does not contest appealability of the district court's order but notes that its concession cannot confer jurisdiction.

The Court of Appeals only has jurisdiction of appeals from "final decisions." 28 U.S.C. § 1291. Thus, appellate jurisdiction in criminal cases ordinarily exists only after conviction and sentencing. Under the collateral order exception, however,

appellate review is allowed in a criminal case in limited situations where a trial court order conclusively determines a disputed question that is completely separate from the merits of the action. *United States v. Ivory*, 29 F.3d 1307, 1311 (8th Cir. 1994) (citing *Flanagan v. United States*, 465 U.S. 259, 79 L. Ed. 2d 288, 104 S. Ct. 1051 (1984)); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545-46, 93 L. Ed. 1528, 69 S. Ct. 1221 (1949) (first recognizing the exception). The exception is available only where a right would effectively be lost if not addressed before trial, and it is applied "with the utmost strictness." *Flanagan*, 465 U.S. at 265.

In the criminal context, the United States Supreme Court has recognized the applicability of the collateral order exception under three circumstances: (1) orders denying motions to reduce bail, (2) orders denying motions to dismiss an indictment on double jeopardy grounds, and (3) orders denying motions to dismiss an indictment on speech and debate grounds. *Id.* at 266, cited in *Ivory*, 29 F.3d at 1311 (refusing to apply the exception to an order denying a motion for trial sanctions). The collateral order exception has been extended to district court orders committing a defendant to the Attorney General's custody under § 4241(d) by several other circuits. *See United States v. Filippi*, 211 F.3d 649, 650-51 (1st Cir. 2000); *United States v. Boigegrain*, 122 F.3d 1345, 1348-49 (10th Cir. 1997) (noting that the majority of circuits[6] have concluded that the collateral

6. In *Boigegrain*, the Tenth Circuit agreed with the majority approach, overruling its prior decision in *United States v. Cheama*, 730 F.2d 1383 (10th Cir. 1984). The Ninth Circuit had adopted the *Cheama* reasoning in *United States v. Ohnick*, 803 F.2d 1485 (9th Cir. 1986). However, the *Boigegrain* court noted that *Ohnick* (Cont'd)

order doctrine is applicable); *United States v. Davis*, 93 F.3d 1286, 1289 (6th Cir. 1996) (stating that "[a]n order of commitment for psychiatric examination easily satisfies the requirements of the collateral order doctrine"); *United States v. Donofrio*, 896 F.2d 1301, 1303 (11th Cir. 1990); *United States v. Gold*, 790 F.2d 235, 238-39 (2d Cir. 1986). In this case, the district court conclusively determined in its order that Ferro was incompetent to stand trial and should be committed to the Attorney General's custody for treatment. Ferro's competence to stand trial is an issue completely separate from the merits of the criminal charges against him. If not allowed to appeal the order at this time, his liberty right to avoid involuntary hospitalization will be lost. Thus, all of the elements of the collateral order exception have been met, and we conclude that jurisdiction to hear Ferro's appeal is proper.

III.

A three-part scheme for determining mental competency to stand trial exists under 18 U.S.C. § 4241. A district court must first determine, by a preponderance of the evidence, whether the defendant suffers from a "mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense." 18 U.S.C. § 4241(a), (d). If the district court concludes that the defendant lacks sufficient mental competency to proceed to trial, "the court

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(Cont'd)

and *Cheama* considered an older version of the statutory scheme, and the Tenth Circuit believed, upon further consideration, that the "majority rule is the better-reasoned approach." *Boigegrain*, 122 F.3d at 1348, n.3.

shall commit the defendant to the custody of the Attorney General" and the "Attorney General shall hospitalize the defendant for treatment . . . for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed. . . ." 18 U.S.C. § 4241(d), (d)(1). Finally, if it becomes apparent that the defendant will not attain sufficient capacity to proceed to trial, a "dangerousness hearing" is conducted in accordance with the provisions of 18 U.S.C. § 4246 to determine if the defendant would pose a "substantial risk of bodily injury to another person or serious damage to property of another" upon release. *See id.* (referring to 18 U.S.C. § 4246(a)).

Ferro argues that § 4241(d) is ambiguous and that a proper reading of the statute does not authorize commitment to the Attorney General's custody unless the defendant's condition is treatable. Ferro avers that the word "shall" is conditioned by the words "as is necessary," thereby mandating involuntary hospitalization only for individuals subject to improvement through treatment. Because Ferro's condition was deemed untreatable by Dr. Rosenberg and Dr. Enriquez and because there was no evidence to the contrary, Ferro concludes that involuntary hospitalization is improper under the statute.

It is clear that the statutory scheme detailed by Congress in § 4241(d) provides the district court with the discretion to initially determine whether the defendant is competent to stand trial. It is also clear from the plain language of the statute, however, that the district court does not have the discretion, prior to a reasonable period of hospitalization in the custody of the Attorney General, to determine whether the defendant will likely attain the

capacity to stand trial. Rather, § 4241(d) provides that the Attorney General "shall hospitalize the defendant . . . as is necessary" to determine whether the defendant's condition will improve. Ferro's argument simply is not supported by the language of the statute.

Moreover, several other circuits have considered whether § 4241(d) requires commitment to the Attorney General upon an initial finding of incompetency, and in all cases, the courts have concluded that the statute is mandatory. *See United States v. Filippi*, 211 F.3d 649, 651 (1st Cir. 2000) (stating that the statute establishes a general rule of commitment without a "case-by-case choice by the district court as to whether to incarcerate once the incompetency finding has been made"); *United States v. Donofrio*, 896 F.2d 1301, 1302 (11th Cir. 1990) (holding that the statute is "mandatory"); *United States v. Shawar*, 865 F.2d 856, 860 (7th Cir. 1989) (concluding that Congress intended mandatory commitment to the Attorney General). These courts have additionally concluded that the permanency of the defendant's condition is not before the district court. *See, e.g.*, *Shawar*, 865 F.2d at 861. Finding these cases persuasive and upon our own reading of the statute, we conclude that after determining that a defendant is incompetent to stand trial, a district court is required to commit the defendant to the custody of the Attorney General for a reasonable period of time to evaluate whether treatment would allow the trial to proceed.

IV.

Ferro argues that committing him for treatment leads to an absurd and harmful result because the examining doctors concluded that there is no current medical procedure capable of

improving Ferro's higher cognitive functioning. He asserts that he is better off near his family and under the care of his own doctors and that commitment will further complicate his condition and cause him harm. Ferro's arguments appear to misapprehend the full extent of "treatment" as that term is used in the statutory scheme.

We believe that the concept of treatment encompasses more than mere improvement. In *United States v. Donofrio*, the Eleventh Circuit concluded that "treatment," as contemplated in § 4241(d), includes "hospitalization for a careful determination of the likelihood of regaining mental capacity to stand trial." *Donofrio*, 896 F.2d at 1303. Likewise, the First Circuit stated in *United States v. Filippi* that even where the evidence before the district court indicated that the defendant's condition was irreversible, Congress intended further hospitalization—i.e., treatment—to "permit a more careful and accurate diagnosis before the court is faced with the serious decision whether to defer trial indefinitely and (quite often) to release the defendant back into society." *Filippi*, 211 F.3d at 651. The limited time period of hospitalization minimizes potential harm to the defendant and comports with due process. *Id.* at 652 (finding the statute constitutional because it is "flexible and case-oriented in determining the length of incarceration").

The district court concluded that Ferro was unable to proceed to trial and assist in his defense based upon the reports of two medical doctors. The reports were made after brief interviews with Ferro and a review of medical records, including an MRI. While Ferro argues that his circumstances differ from the circumstances in the cases cited above due to the conclusive MRI results, we do not believe that further investigation into

Ferro's condition is "absurd." To be sure, the miracles of science suggest that few conditions are truly without the possibility of improvement. Therefore, even where the medical reports presented to the district court showed by a preponderance of the evidence that the condition was permanent, the statutory scheme appropriately affords additional time during which the Attorney General may explore medical options.

Finally, as set forth by Congress, § 4241 and § 4246, read together, entitle the government to a dangerousness hearing before a defendant is released due to incompetency to stand trial. The government is entitled to show that the defendant poses a risk of harm to others or damage to property and that the defendant should remain in custody even though there is no potential of attaining the capacity to stand trial. "The dangerousness issue only arises under the statute when the defendant already has been committed under § 4241. . . ." *Shawar*, 865 F.2d at 862. Ferro's suggestion that he would benefit from remaining at home and under the care of his own doctors, in effect, short-circuits the statutory scheme by allowing the district court to make an initial determination that the defendant's condition will not improve without triggering the need for a dangerousness hearing. For this additional reason, Ferro's arguments must be rejected.

The order of the district court committing Louie A. Ferro, Sr. to the custody of the Attorney General is affirmed.

APPENDIX B — ORDER OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED JUNE 21, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 99-00180-02-CR-W-SOW

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIE A. FERRO, SR.,

Defendant.

ORDER

Before this Court is the Report and Recommendation of United States Magistrate regarding the issue of whether defendant Louie A. Ferro, Sr. is competent to stand trial. The Report and Recommendation of the Magistrate in this case is both thorough and well-reasoned. This Court has made an independent review of the record, agrees with this recommendation, and sees no reason to comment further. Accordingly, it is hereby

ORDERED that the Court finds that defendant Louie A. Ferro, Sr. is incompetent. It is further

Appendix B

ORDERED that defendant Louie A. Ferro, Sr. is committed to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in suitable facility for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future defendant Ferro will attain the capacity to permit the trial to proceed.

s/ Scott O. Wright
SCOTT O. WRIGHT
Senior United States District Judge

Dated: JUN 21 2002

APPENDIX C — REPORT AND RECOMMENDATION OF THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF MISSOURI, WESTERN DIVISION DATED AND FILED MAY 21, 2002

IN THE UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF MISSOURI
WESTERN DIVISION

No. 99-00180-02-CR-W-SOW

UNITED STATES OF AMERICA,

Plaintiff,

vs.

LOUIE A. FERRO, SR.,

Defendant.

REPORT AND RECOMMENDATION

Currently pending before the Court is the issue of whether defendant Louie A. Ferro, Sr., is competent to stand trial and if defendant is not competent to stand trial, the steps which must be taken to determine whether there is a substantial probability that he will attain the capacity to permit the trial to proceed in the foreseeable future.

I. *THE INDICTMENT*

On July 14, 1999, the Grand Jury returned a fifteen count indictment against Louie A. Ferro, Jr., Louie A. Ferro, Sr., Wilbur Swift and Kevin D. Staley. The indictment charges defendants with

conspiracy to transport property obtained by fraud across state lines and to use the United States mails to execute a scheme to defraud in violation of 18 U.S.C. § 371 (Count One); conspiracy to commit money laundering in violation of 18 U.S.C. § 1956(h) (Count Two); the interstate transportation of pharmaceutical goods obtained by fraud in violation of 18 U.S.C. § 2314 (Counts Three through Nine); mail fraud in violation of 18 U.S.C. 1341 (Counts Ten through Twelve); and conducting financial transactions using proceeds obtained by fraud in violation of 18 U.S.C. § 1956(a)(1)(A)(i) (Counts Thirteen and Fourteen).

II. *THE STATUTE*

18 U.S.C. § 4241, entitled Determination of Mental Competency to Stand Trial, provides in part:

> (a) **Motion to determine competency of defendant.**—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, or shall order such a hearing on its own motion, if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense.
>
> (b) **Psychiatric or psychological examination and report.**—Prior to the date of the hearing, the court

may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).

(c) **Hearing.**—The hearing shall be conducted pursuant to the provisions of section 4247(d).[1]

(d) **Determination and disposition.**—If, after the hearing, the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

(1) for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the

---

1. Section 4247(d) provides:

Hearing.—At a hearing ordered pursuant to this chapter the person whose mental condition is the subject of the hearing shall be represented by counsel and, if he is financially unable to obtain adequate representation, counsel shall be appointed for him pursuant to section 3006A. The person shall be afforded an opportunity to testify, to present evidence, to subpoena witnesses on his behalf, and to confront and cross-examine witnesses who appear at the hearing.

foreseeable future he will attain the capacity to permit the trial to proceed; and

(2) for an additional reasonable period of time until—

(A) his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or

(B) the pending charges against him are disposed of according to law;

whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.[2]

* * *

18 U.S.C. § 4241 (a) through (d).

---

2. Section 4246 provides for the hospitalization of a person who has been committed to the custody of the Attorney General pursuant to section 4241(d) and whose release would create a substantial risk of bodily injury to another person or serious damage to property of another.

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III. *FACTUAL FINDINGS*

On October 12,1999, the Government filed a Motion to Determine Mental Competency with respect to Louie A. Ferro, Sr. The background facts set forth in the Government's motion provide:

> 1. On July 14, 1999, a grand jury returned an indictment against, among others, defendant Louie Ferro, Sr., alleging fraud and money laundering. Prior to indictment, on July 9, 1999, defendant's counsel faxed to counsel for the United States a correspondence referring to Mr. Ferro, Sr.'s stroke in November of 1998 and, based on this condition, requested that he be allowed to self-surrender. The United States acceded to this request.
>
> 2. On July 27, 1999, this Court conducted an arraignment and omnibus hearing. At the time of this hearing, defendant Ferro, Sr., stated that he would not raise a defense of incompetency to stand trial nor would he file a motion for an examination under 18 U.S.C. § 4241. . . .
>
> 3. Also on July 27,1999, the Court conducted a hearing pursuant to Rule 44(c) of the Federal Rules of Criminal Procedure. During this hearing, defense counsel asserted that Mr. Ferro, Sr., was competent to waive his right to separate representation.
>
> 4. On September 10,1999, counsel for Mr. Ferro faxed a correspondence to counsel for the United States, along with a neurological report from Dr. Terrie L. Price.

In his letter, defense counsel states that "the test results and Dr. Price's views represent substantial evidence that Mr. Ferro is unable to effectively participate in his defense. Dr. Price's comments indicate a present inability by Mr. Ferro to assist in his defense. This opinion is consistent with my experience to date." . . .

5. The immediate reaction by government counsel was to seek an independent analysis of defendant's condition. To that end, the government obtained a medical waiver for defendant Louie A. Ferro, Sr., and sought out a medical expert to perform an evaluation. Prior to the evaluation however, and upon review of 18 U.S.C. § 4241, and based upon the multiple representations as to defendant Louie A. Ferro, Sr.'s competency, including waiving his right to independent counsel, government counsel concluded that the procedure required pursuant to § 4241 should be employed. . . .

(Government's Motion to Determine Mental Competency at 1-3)

Additional background facts were provided by defense counsel in Defendant Ferro, Sr.'s Suggestions in Opposition to the Government's Motion to Determine Mental Competency:

Dr. Rosenberg [the expert retained by the Government] conducted his evaluation of Defendant in December 1999, and provided to Government counsel his Psychiatric Evaluation dated December 20, 1999. Dr. Rosenberg concluded that Defendant

> was not competent to stand trial and that "the prognosis for further improvement is probably extremely poor." By letter dated December 21, 1999, Government counsel distributed Dr. Rosenberg's report to the Court and to the undersigned counsel. . . . Government counsel also included in that letter a request for a hearing under 18 U.S.C. § 4241(c).
>
> The hearing requested by the Government was not scheduled at that time inasmuch as the Magistrate Judge recommended in February 2000 the dismissal of the indictment, a recommendation that was adopted by the Court in May 2000. The Government thereafter prevailed on appeal. The Defendants' Petition for a Writ of Certiorari was denied by the Supreme Court on January 7, 2002.
>
> At the Court's Status Conference on January 25, 2002, Defendant's counsel stated that the Defendant has deteriorated since his examination in 1999. Also, both the Government and Defendant indicated that the motion could be decided by the court without a hearing. Defendant, however, has reconsidered and now requests a hearing on the motion.

(Defendant Ferro, Sr.'s Suggestions in Opposition to the Government's Motion to Determine Mental Competency at 3)

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The December 20, 1999, psychiatric evaluation conducted by Stanton L. Rosenberg, M.D., provides in part:

> In my opinion, Mr. Ferro is suffering from a dementia of a moderately severe degree; I would not call it a severe degree. He evidences some ability to understand the examiner's questions and some ability to answer some questions rather correctly. However, it is my opinion that when push comes to shove, that is to say when the trial actually begins, that his ability to assist his counsel in his own defense will become diminished, and he will regress to some considerable degree. This sort of "snap shot" look at his functioning does not give us an accurate predictor of the way that he would function in the face of a trial. If I were to advise that I felt him competent to stand trial, and that he met the test of understanding the charges against him and was able to assist counsel in his own defense, I would have to do that with one very important caveat: The very real possibility that once the trial had begun, Mr. Ferro would fall apart and not function adequately to assist counsel in his own defense. This has been a very difficult call, but when I consider all of the evidence that he presented during my time with him, I do not feel that he is competent to stand trial. I base that on the limited degree of cognitive functioning that he demonstrates, his emotional lability, and that he really does not comprehend how stressful such a trial will be, even though he, himself, says he is willing to go to trial.

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> Diagnostically, I feel that he is suffering from a moderate degree of dementia, secondary to his stroke in November of 1998; the prognosis for further improvement is probably extremely poor; his prognosis, medically speaking, is probably guarded in so far as he suffers from both hypertension, and as well having had a stroke one year ago.

(Defendant Ferro, Sr.'s Suggestions in Opposition to the Government's Motion to Determine Mental Competency at Ex. G)

Dr. Rosenberg conducted a follow-up evaluation of defendant in February 2002. This follow-up psychiatric evaluation provides in part:

> It is clear that Mr. Ferro's mental status has deteriorated significantly since my report of December 20, 1999. . . .
>
> When proceeding to higher levels of cognitive functioning, he had clearly declined in function since my first evaluation. . . .
>
> I had the opportunity to speak with Mrs. Ferro, who indicated that Mr. Ferro has frequent spells of "zoning out," lasting some five to ten minutes. My primary diagnosis here is that these episodes constitute TIAs (Transient Ischemic Attacks) which represent his chronic cerebro vascular disease which initially manifested itself when he first had his stroke. This disease is not curable and is progressive in nature, which will mean that his dementia will continue unabated.

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> Considering the above, and when reevaluating my letter of December 20, 1999, it is clear that Mr. Ferro's mental condition continues to deteriorate. I deem him to be unable to stand trial and assist counsel in his own defense because of severe compromises of higher cognitive functioning, which includes memory, concentration, common sense, assessment of problems, and problem-solving abilities. These functions are gone and will not return.
>
> I have been told that there has been some recommendation that Mr. Ferro be sent elsewhere for a 90-day evaluation of his competency to stand trial. This seems to me to be redundant and unnecessary; I also believe that being deprived of his support system for one-fourth of a year will compromise his already present dementia and make matters worse for him.

(Defendant Ferro, Sr.'s Suggestions in Opposition to the Government's Motion to Determine Mental Competency at Ex. H)

By letter dated February 26, 2002, Dr. Rosenberg wrote:

> You have my most recent evaluation of Mr. Ferro, and in addition, I requested that he have an MRI of his head. The findings speak for themselves, but indicate severe brain damage. Notice under findings, Paragraph 1: "The hemispheric white matter volume is diminished." This means that his cerebral cortex, that part of the brain that has to do with high-level

cognitive functioning, has been reduced considerably in size. Paragraph 2 indicates that there is a lesion in the right cerebellar hemisphere. This lesion has some focal hemorrhage. In other words, he has had a brain hemorrhage with cerebellar infarction. Infarction means death of brain tissue. The cerebellum is also important in cognitive, or high-level, brain functioning. Note Paragraph 3: "The volume of the cerebellum has diminished." This coincides with the total decrease in brain volume. Notice the examiner's impressions: "Extensive hemispheric white matter abnormalities consistent with subacute and old infarcts." Infarct refers to death of brain tissue, secondary to vascular disease and lack of supply of oxygen to the brain." He refers again to lesions in the cerebellum, to which I have previously referred. In his report, he states, "There is prominence of the sulci." This refers to the fact that when one looks at the gross specimen of the brain, one sees grooves. In atrophy of the brain, secondary to dementia, which is secondary to vascular disease in Mr. Ferro's instance, the shrinking of the brain substance itself results in a deepening of these grooves or chasms in the brain. The MRI substantially and definitively defines the fact that this man is suffering from a progressive dementia and, in my opinion, is incapable of assisting counsel in his own defense.

(Defendant Ferro, Sr.'s Suggestions in Opposition to the Government's Motion to Determine Mental Competency at Ex. J)

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By letter dated March 19, 2002, defendant's treating physician, Roman Enriquez, M.D., wrote:

> Mr. Ferro lives with his wife, son and daughter. He is dependent on his family for his day-to-day needs.
>
> This year Mr. Ferro was reexamined on January 2, 2002, and March 7, 2002. His examination included an MRI brain, and psychiatric evaluations.
>
> Mr. Ferro complains of forgetfulness. He has not written checks recently because of difficulty with calculations. He has dysphonia, has difficulty expressing himself, and has difficulty formulating answers to questions. He has difficulty remembering dates — on March 7, 2002, he said it was March 9. His mini mental status score is poor which is consistent with cognitive impairment. Mr. Ferro expressed to me that he has difficulty walking because his balance is unsteady. Since 1998, Mr. Ferro's neurological deficits remain, and his cognitive function has deteriorated and is unlikely to improve. His MRI of the brain showed extensive hemispheric white matter abnormalities consistent with subacute, and old infarct, and other conditions related to small vessel disease. These changes are extensive in the frontal area. Cerebellar infarcts were also noted. This is consistent with vascular dementia which is a progressive dementing illness. . . .

(Defendant Ferro, Sr.'s Suggestions in Opposition to the Government's Motion to Determine Mental Competency at Ex. I)

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IV. *DISCUSSION*

While "Defendant respectfully requests this Court to declare Defendant incompetent to stand trial,"[3] defendant does not want to be committed to the custody of the Attorney General for treatment pursuant to section 4241(d). Defendant advances two arguments: (1) where a defendant's condition is found to be permanent rather than temporary, the defendant should not be incarcerated pursuant to 18 U.S.C. § 4241(d) for the purpose of conducting an additional evaluation;[4] and (2) the Court should find that defendant is suffering from a physical impairment, rather than a mental disease or defect, sever his trial and continue it "without day."[5] The Court will discuss each of defendant's arguments.

A. *Permanent Rather Than Temporary*

Defendant argues: "When a Defendant's condition was found to be permanent rather than temporary, 18 U.S.C. § 4244 [now § 4241 (d)], has been interpreted to not permit incarceration for the purpose of conducting an additional evaluation. *Gillig v. Atty. Gen.*, 201 F.2d 556 (10th Cir. 1953)." (Defendant Ferro, Sr.'s Suggestion in Opposition to the Government's Motion to Determine Mental Competency at 5)

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3. (Defendant Ferro, Sr.'s Suggestions in Opposition to the Government's Motion to Determine Mental Competency at 6)

4. (Defendant Ferro, Sr.'s Suggestions in Opposition to the Government's Motion to Determine Mental Competency at 5)

5. (Defendant Ferro, Sr.'s Supplemental Suggestions in Opposition to the Government's Motion to Determine Mental Competency at 4)

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As pointed out by the Government, the authority presented by defendant arises from an earlier version of the statute and the pertinent wording of the statute has changed. The earlier version of the statute is set forth in *Gillig*:

Section 4246 provides:

> Whenever the trial court shall determine in accordance with sections 4244 and 4245 of this title that an accused is or was mentally incompetent, the court *may* commit the accused to the custody of the Attorney General or his authorized representative, until the accused shall be mentally competent to stand trial or until the pending charges against him are disposed of according to law.

Wells, by Gillig. v. Attorney Gen., 201 F.2d 556, 558-59 (10th Cir. 1953)(emphasis added). The current version of the statute does not provide any discretion to the court after a defendant is found mentally incompetent to stand trial. Section 4241(d) provides that "the court *shall* commit the defendant to the custody of the Attorney General" after a finding that the defendant is mentally incompetent. (emphasis added)

Various courts have struggled with the issue of committing a defendant to the custody of the Attorney General for further testing when the defendant's condition is permanent, but the overwhelming consensus appears to be that the courts have no discretion and that they must comply with the procedures established by section 4241(d). *See United States v. Filippi*, 211 F.3d 649, 650-51 (1st Cir. 2000)(where defendant suffered from vascular dementia, an irreversible condition, district court

had no discretion and had to commit defendant for an initial period of up to four months after finding defendant incompetent to stand trial); *United States v. Donofrio*, 896 F.2d 1301, 1302 (11th Cir. 1990)(section 4241(d) is mandatory and district court did not have authority to circumvent hospitalization even where evidence shows that defendant will never attain capacity to permit trial to proceed); *United States v. Shawar*, 865 F.2d 856, 861 (7th Cir. 1989)("Our reading of 18 U.S.C. § 4241(d) is not only that commitment is mandatory, but also that likelihood of recovery is not something to be considered by the district court in deciding whether to commit the defendant for the evaluation period."); *United States v. Duhon*, 104 F.Supp.2d 663, 668 (W.D. La. 2000)("Although it appeared both absurd and harmful to separate from his family a mentally retarded person with the understanding of a seven-year old in order to attempt to 'restore competency,' the court concluded it had no discretion to do otherwise.")

B. *Physical Impairment, Rather Than A Mental Disease Or Defect*

In an attempt to take defendant Ferro's situation outside the scope of 18 U.S.C. § 4241(d), defense counsel argues that defendant's condition is a physical impairment, rather than a mental disease or defect. (Defendant Ferro, Sr.'s Supplemental Suggestions in Opposition to the Government's Motion to Determine Mental Competency at 4) The cases cited by defense counsel for the proposition that defendant's condition be considered a physical impairment, *United States v. Doran*, 328 F. Supp. 1261 (S.D.N.Y. 1971), and *United States v. Jones*, 876 F. Supp. 395 (N.D.N.Y. 1995), are not particularly helpful. In *Doran*, the defendant, like defendant Ferro, had suffered a stroke. However, unlike defendant Ferro, defendant Doran's

mental condition was not found to be so impaired as to make him incompetent to stand trial. 328 F. Supp. at 1262. The reason defendant Doran's trial was "postponed without day" was that his medical problems rendered him unfit to stand trial in that the court found there was a substantial risk that the stress of a trial would cause the defendant severe trauma and possibly death. *Id.* at 1261-64. The Court has been presented with no similar evidence as to defendant Ferro. In *Jones*, there was no issue of mental incompetency. Instead, defendant Jones argued that his trial should be continued because he was at a substantial risk of developing a heart attack were he to undergo the physical and emotional exertion associated with a trial. 876 F. Supp. at 396-97. Again, the Court has been presented with no similar evidence as to defendant Ferro.

The evidence before the Court is that defendant Ferro is "unable to stand trial and assist counsel in his own defense because of severe compromises of higher cognitive functioning, which includes memory, concentration, common sense, assessment of problems, and problem-solving abilities." (Psychiatric Evaluation of Dr. Rosenberg in February 2002) Defendant Ferro's situation appears to fall directly under 18 U.S.C. § 4241. Unlike the evidence presented in *Doran* and *Jones*, there has been no evidence presented in this case to suggest that the stress of undergoing a trial might kill defendant Ferro, making him "physically incompetent" to stand trial.

C. *Hearing*

At the Court's Status Conference on January 25, 2002, both Government counsel and defendant's counsel indicated that the Government's Motion to Determine Mental Competency could

be decided by the Court without a hearing. Defendant, however, "now requests a hearing on the motion should the Court not grant the relief sought" in defendant's supplemental suggestions, i.e. that defendant's condition be considered a physical impairment and outside the scope of section 4241(d). (Defendant Ferro, Sr.'s Supplemental Suggestions in Opposition to the Government's Motion to Determine Mental Competency at 3) Later in his supplemental suggestions, defendant expounds upon the requested hearing:

> Should the Court . . . decide that Mr. Ferro's inability to effectively participate in his defense should be considered under the procedures outlined in 18 U.S.C. § 4241, then Mr. Ferro respectfully requests a hearing so that witnesses can be examined for the purpose of demonstrating that there is no suitable facility within the Bureau of Prisons; or elsewhere for that matter, to meet the intended purposes of 18 U.S.C. §§ 4241 and 4247 in Mr. Ferro's case.

(Defendant Ferro, Sr.'s Supplemental Suggestions in Opposition to the Government's Motion to Determine Mental Competency at 6)

As set forth above, the Court finds that defendant's inability to effectively participate in his defense should be considered under the procedures outlined in 18 U.S.C. § 4241. Given this finding, defendant requests a hearing so that counsel can argue that there is no suitable facility. Based on the wording of the statute, however, even if the Court felt there were no suitable facilities, the Court would have no choice but to order the commitment of the defendant to the custody of the Attorney General. Further, defendant has provided no authority to suggest that the Court

has any discretion to rule whether the Attorney General must send defendant to a particular facility for treatment. The Court's review of the case law suggests that this decision is to be left to the Attorney General. *See United States v. Sherman*, 722 F. Supp. 504, 505-06 (N.D. Ill. 1989). Given the fact that the Court cannot direct whether or where defendant will be sent for treatment, there is no point in holding a hearing to determine which, if any, facilities the Court considers suitable.

V. *CONCLUSION*

The evidence before the Court provides reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense. Given the clear wording of the statute and the case law presented above, the Court has no choice but to commit the defendant to the custody of the Attorney General for a period not to exceed four months to determine whether there is a substantial probability that in the foreseeable future the defendant will attain the capacity to permit the trial to proceed. Therefore, it is

RECOMMENDED that the Court, after making an independent review of the record and applicable law, enter an order finding that defendant Louie A. Ferro, Sr., is incompetent. It is further

RECOMMENDED that the Court commit defendant Louie A. Ferro, Sr., to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment

in a suitable facility for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future defendant Ferro will attain the capacity to permit the trial to proceed.

Counsel are reminded they have ten days from the date of receipt of a copy of this Report and Recommendation within which to file and serve objections to same. A failure to file and serve objections by this date shall bar an attack on appeal of the factual findings in this Report and Recommendation which are accepted or adopted by the district judge, except on the grounds of plain error or manifest injustice.

s/ Sarah W. Hays
SARAH W. HAYS
UNITED STATES MAGISTRATE JUDGE

APPENDIX D — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT DENYING PETITION FOR REHEARING DATED AND DECIDED APRIL 23, 2003

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 02-2805

UNITED STATES OF AMERICA,

Appellee,

v.

LOUIE A. FERRO, SR.,

Appellant.

April 23, 2003, Decided

OPINION

The petition for rehearing by the panel filed by appellant is denied.

APPENDIX E — STATUTES AND RULES INVOLVED

18 U.S.C. § 4241

18 U.S.C. § 4241. Determination of mental competency to stand trial

> **(a) Motion to determine competency of defendant.**—At any time after the commencement of a prosecution for an offense and prior to the sentencing of the defendant, the defendant or the attorney for the Government may file a motion for a hearing to determine the mental competency of the defendant. The court shall grant the motion, . . . if there is reasonable cause to believe that the defendant may presently be suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable . . . to assist properly in his defense.
>
> **(b) Psychiatric or psychological examination and report.**—Prior to the date of the hearing, the court may order that a psychiatric or psychological examination of the defendant be conducted, and that a psychiatric or psychological report be filed with the court, pursuant to the provisions of section 4247(b) and (c).
>
> * * *
>
> **(d) Determination and disposition.**—If, . . . the court finds by a preponderance of the evidence that the defendant is presently suffering from a mental disease or defect rendering him mentally incompetent

to the extent that he is unable . . . to assist properly in his defense, the court shall commit the defendant to the custody of the Attorney General. The Attorney General shall hospitalize the defendant for treatment in a suitable facility—

> **(1)** for such a reasonable period of time, not to exceed four months, as is necessary to determine whether there is a substantial probability that in the foreseeable future he will attain the capacity to permit the trial to proceed; and
>
> **(2)** for an additional reasonable period of time until—
>
> > **(A)** his mental condition is so improved that trial may proceed, if the court finds that there is a substantial probability that within such additional period of time he will attain the capacity to permit the trial to proceed; or
> >
> > **(B)** the pending charges against him are disposed of according to law; whichever is earlier.

If, at the end of the time period specified, it is determined that the defendant's mental condition has not so improved as to permit the trial to proceed, the defendant is subject to the provisions of section 4246.

* * * *

Appendix E

18 U.S.C. § 4246

18 U.S.C. § 4246. Hospitalization of a person due for release but suffering from mental disease or defect

> **(a) Institution of proceeding.**—If the director of a facility in which a person is hospitalized certifies that a person in the custody of the Bureau of Prisons . . . who has been committed to the custody of the Attorney General pursuant to section 4241(d), . . . is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, and that suitable arrangements for State custody and care of the person are not available, he shall transmit the certificate to the clerk of the court for the district in which the person is confined. The clerk shall send a copy of the certificate to the person, and to the attorney for the Government, and, if the person was committed pursuant to section 4241(d), to the clerk of the court that ordered the commitment. The court shall order a hearing to determine whether the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another. A certificate filed under this subsection shall stay the release of the person pending completion of procedures contained in this section.

* * *

(d) Determination and disposition.—If, after the hearing, the court finds by clear and convincing evidence that the person is presently suffering from a mental disease or defect as a result of which his release would create a substantial risk of bodily injury to another person or serious damage to property of another, the court shall commit the person to the custody of the Attorney General. The Attorney General shall release the person to the appropriate official of the State in which the person is domiciled or was tried if such State will assume responsibility for his custody, care, and treatment. The Attorney General shall make all reasonable efforts to cause such a State to assume such responsibility. If, notwithstanding such efforts, neither such State will assume such responsibility, the Attorney General shall hospitalize the person for treatment in a suitable facility, until—

(1) such a State will assume such responsibility; or

(2) the person's mental condition is such that his release, or his conditional release under a prescribed regimen of medical, psychiatric, or psychological care or treatment would not create a substantial risk of bodily injury to another person or serious damage to property of another;

whichever is earlier. The Attorney General shall continue periodically to exert all reasonable efforts to cause such a State to assume such responsibility for the person's custody, care, and treatment.

* * * *

Appendix E

18 U.S.C. § 4247

18 U.S.C. § 4247. General provisions for chapter

(a) Definitions.—As used in this chapter—

* * *

(2) "suitable facility" means a facility that is suitable to provide care or treatment given the nature of the offense and the characteristics of the defendant; and

* * *

(b) Psychiatric or psychological examination.—A psychiatric or psychological examination ordered . . . shall be conducted by a licensed or certified psychiatrist or psychologist, or, if the court finds it appropriate, by more than one such examiner. . . . For the purposes of an examination pursuant to an order under section 4241, . . . the court may commit the person to be examined for a reasonable period, but not to exceed thirty days, . . . to the custody of the Attorney General for placement in a suitable facility. . . . The director of the facility may apply for a reasonable extension, but not to exceed fifteen days under section 4241, . . . upon a showing of good cause that the additional time is necessary to observe and evaluate the defendant.

Appendix E

(c) Psychiatric or psychological reports.— A psychiatric or psychological report . . . shall be filed with the court . . . and shall include—

(1) the person's history and present symptoms;

(2) a description of the psychiatric, psychological, and medical tests that were employed and their results;

(3) the examiner's findings; and

(4) the examiner's opinions as to diagnosis, prognosis, and—

(A) if the examination is ordered under section 4241, whether the person is suffering from a mental disease or defect rendering him mentally incompetent to the extent that he is unable to understand the nature and consequences of the proceedings against him or to assist properly in his defense;

* * *

(C) if the examination is ordered under section . . . 4246, whether the person is suffering from a mental disease or defect as a result of which his release would create

a substantial risk of bodily injury to another person or serious damage to property of another;

* * *

(i) Authority and responsibility of the Attorney General.—The Attorney General—

* * *

(C) shall, before placing a person in a facility pursuant to the provisions of section 4241, . . . consider the suitability of the facility's rehabilitation programs in meeting the needs of the person;

* * * *

Appendix E

FEDERAL BUREAU OF PRISONS

P.S. 5310.12
Chapter 9

Maximum time permitted by statute for specific studies is as follows:

4241(b) – Competency Study:
30-days, with a possible 15-day extension.

* * *

4241(d) – Treatment to Restore Competence: 120 days, with an extension only if the substantial probability exists that, with additional treatment, the inmate will become competent in the foreseeable future.

* * *

D. ISSUES RELATED TO THE FORENSIC EVALUATION PROCESS

(1) Providing Treatment for Forensic Cases

Policy and professional ethics dictate that psychologists completing forensic evaluations make every effort to avoid role conflicts. Whenever possible, the forensic evaluator should not be the

person providing therapy or otherwise overseeing the treatment of the person being evaluated.

Study cases referred under Title 18, U.S. Code, Sections 4241(b) . . . are referred primarily for evaluation and not treatment. However, necessary crisis intervention must always be provided by an appropriate professional. . . .

* * *

(3) Report Format

Each report completed pursuant to Title 18, U.S. Code, Sections 4241 through 4246, must, by law, contain the following information:

* * *

(c) The evaluator's findings.

(d) A current diagnosis (in proper DSM-III-R format).

(e) A prognosis.

(f) The evaluator's opinion on the court's question(s). (Final opinions should normally be stated in the exact wording of the statute. . . .

Ordinarily, each forensic report should address only those specific issues and legal questions raised by the court. For example, if the court requests an opinion

of competency only, responsibility should not be addressed. Similarly, unless requested, predictions of dangerousness should not be addressed except if they pertain to imminent danger to self or others.

* * *

COURT AND/OR OTHER OUTSIDE AGENCY EVALUATION FORMAT

* * *

Psychological Evaluation

* * *

Findings (May include the following):

* * *

. . . Comment upon the presence or absence of brain damage, motor impairment, organic disorder, and other related physical disorders, and whether treatment could be beneficial or corrective.

* * *

Response to Referral Ouestions: This section is to be used only if specific questions have been asked. If there are no questions, then omit this section and place findings in the Conclusion section.

Appendix E

Diagnosis: This section is not to be used unless specifically requested. If a diagnosis is requested, use DSM-III-R.

Conclusion: Use one line to identify the case and referral issues. Describe in clear and unambiguous terms the general findings and abbreviated specific results. Treatment recommendations, if any, are to be as specific as possible. There should be no treatment recommendations for competency evaluations unless specifically requested.

Appendix E

P.S. 6000.05
Chapter IX

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Section 5. Forensic Studies and Reports

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Individuals found incompetent to stand trial may be recommitted to the custody of the Attorney General for 120 days to be hospitalized for treatment in a suitable facility under Section 4241(d). It is the clinical staff's obligation to attempt to restore this individual to competency to stand trial within the time frame allowed. If, in the opinion of the evaluating clinician, there is a substantial probability that in the foreseeable future the individual could become competent, an extension may be requested from the committing court. Near the conclusion of the study period, the clinician must conclude either that the individual is now competent to stand trial, or that he/she remains incompetent, and there is or is not a substantial probability that in the foreseeable future he/she will attain competency.

If the individual is not restorable and is mentally ill and his/her release would pose a risk of harm to others or the property of others, a petition to stay release pursuant to 4246 should be filed with the local Federal Court.

* * * *